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IN THE

Supreme Court of the United States

October Term, 1960

No. 460

ANTHONY PETER RIELA,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF TIOGA COUNTY, NEW YORK

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UNITED STATES CONSTITUTION

Fourteenth Amendment 2, 7, 12, 13

IN THE

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October Term, 1960

No.

ANTHONY PETER RIELA,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF TIOGA COUNTY, NEW YORK

The petitioner, Anthony Peter Riela, prays that a writ of certiorari issue to review the judgment of the County Court of Tioga County of the State of New York, entered in the above entitled case on July 12, 1960.

Opinions Below

The opinion of the Court of Appeals is reported in 7 N. Y. 2d 571, 200 N. Y. S. 2d 43, appended hereto as Appendix "A"; the Appellate Division, Third Department opinion, is reported in 9 App. Div. 2d 481, 195 N. Y. S. 2d 558 and is set forth in the Record at pages 456-463; the trial court, County Court, Tioga County opinion is reported in 14 Misc. 2d 213, 178 N. Y. S. 2d 873, and is set forth in the Record at pages 430-446; the Court of Appeals opinion denying

the motion for reargument is dated July 8, 1960 and is appended hereto as Appendix "B", and the Court of Appeals opinion amending the remittitur to include a constitutional question is dated July 8, 1960 (not yet officially reported), is appended hereto as Appendix "C".

Grounds On Which Jurisdiction Is Invoked

(i) The judgment of the Tioga County Court was entered on July 12, 1960 (Appendix "D") based upon the judgment of the Court of Appeals which, on April 20, 1960, reversed in part the judgment of conviction of the Appellate Division, Third Department, and remitted the case to the Tioga County Court for resentence.

(ii) A motion for reargument was denied by the Court of Appeals on July 8, 1960 (Appendix "B").

(iii) The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Questions Presented for Review

(1) Was the contempt conviction repugnant to the Fourteenth Amendment where a New York grand jury confers New York State immunity on a New Jersey resident witness, repeats the questions and the witness reasserts his plea of privilege, *but the Court fails to direct the non-resident witness to answer* the questions or to permit witness to prove the existing perils of prosecution in his home state and the Federal government as well as the inadequacy of the immunity offered?

(2) Is the joint application of Penal Law § 2447 with § 618-a of the Code of Criminal Procedure, to the facts

herein, repugnant to the spirit and interpretation of the Fourteenth Amendment, and were the witness's rights and privileges thereunder violated, where a New York nonresident grand jury witness, a target of investigation and a potential defendant, is brought into New York by designating him as a material witness, and the New York immunity conferred is not co-extensive with the perils of prosecution existing for him in his home state, other states and the Federal government, and Tioga County grand jury minutes have, pursuant to court orders, been transmitted without secrecy restrictions, to New York State agencies which are obligated by state (§§ 7051-7057, McKinney's Unconsol. Laws) to cooperate with witness's home state, other states and the Federal government and *the Court fails to direct the witness to answer* grand jury questions despite his pleas of privilege against self-incrimination?

(3) Was appellant denied due process by court's preclusion of proof as to the existence and reality of the perils of prosecution, lack of authority, good faith and jurisdiction of the grand jury and inadequate immunity conferred?

Statutes Involved

Penal Law § 600, subd. (6).

Code of Criminal Procedure § 618-a, subd. 2, 3.

Penal Law § 2447, subd. 1, 2, 3(c).

Unconsolidated Laws § 7052, subd. 5, 6, 7, 9.

New Jersey Revised Statutes, Article 2, 2A:81-4 and 2A:81-5.

General Business Law § 352, subd. 5.

(The aforementioned statutes are set forth in Appendix "E".)

Statement of the Case

Appellant, a New Jersey resident, a potential defendant and target of investigation of the Tioga County Grand Jury of New York, was pursuant to the application of § 618-a of the New York Code of Criminal Procedure, compelled to appear there as a material witness. He asserted his constitutional privilege against self-incrimination before that body in refusing to answer their questions. The grand jury having knowledge of his non-residency, offered him New York State immunity (Penal Law § 2447), and again questioned him. Again he pleaded privilege. Instead of being taken before the Court for a direction to answer or permitted to establish his real and existing peril of prosecution, in his home state, other states and the Federal government, the grand jury indicted him for contempt of court (Penal Law § 600, subd. (6)).

At the trial, a jury was waived.

The defense established his non-residency, the improper application of § 618-a C.C.P. and § 2447 P.L. to the instant case, the absence of a court direction that the witness answer grand jury questions, the transmittal of grand jury minutes to state agencies cooperating with other states and the Federal government (§§ 7051-7057, Unconsolidated Laws, McKinney's) and the obvious inadequacy of New York immunity to a non-resident witness.

The defense was precluded from proving that the existing perils of prosecution were real and substantial (*Hoffman* v. *United States*, 341 U. S. 479); that the grand jury

was not acting in good faith but was created and used as the "tool" of the Acting Commissioner of Investigation; that it lacked jurisdiction and authority to pursue the inquiry; that it was investigating a meeting and a party and not a crime (R. 182); and that the New York immunity was dissipated when the grand jury minutes were made available to agencies cooperating with other states and the Federal government, the judge having failed to impose restrictions on their secrecy.

Timely Raising of Federal Questions

The federal questions sought to be reviewed are and were raised as follows:

(i) The denial of procedural due process by the improper application and use of a § 618-a of the Code of Criminal Procedure to obtain the presence in New York State of the non-resident appellant by alleging he was a material witness before a New York grand jury when in fact he was a potential defendant and target of investigation.

This issue was raised before the trial court by motion on February 13, 1958 and denied (R. 31); on the motion to acquit (R. 269, 289), denied (R. 269, 422); by statements to the court (R. 31, 50-56), and by the District Attorney's statement to the appellant (R. 71). The trial court's opinion held that this issue is collateral and not relevant and that the witness appeared voluntarily (R. 445).

The point was further pursued before the Appellate Division, Third Department in Point II (pp. 17-23) of Appellant's Brief and rejected in that court's opinion (R. 457-459).

In the Court of Appeals, the point was urged in Point VI (pp. 36-42). The Court of Appeals considered this argument in conjunction with other constitutional issues as appears from the amendment of its Remittitur on July 8, 1960 (Appendix "C").

(ii) The joint application of § 618-a Code of Criminal Procedure with § 2447 Penal Law to a New York non-resident violates procedural due process under the Fourteenth Amendment where the witness is a potential defendant and a target of investigation, and the New York State immunity is not co-extensive with the perils of prosecution in the witness's home state, other states, and the Federal government, where New York grand jury minutes are forwarded to a State Commission of Investigation obligated by statute (Unconsol. Laws, § 7052, subd. (5, 6)) to investigate violations of federal law in New York and to cooperate with other states and the Federal government.

This point was urged before the trial court in a motion for dismissal of the indictment (R. 201, 210-214, 218-219, 262, 304-306, 344-345), and in a motion for arrest of judgment (R. 383-385, 402, 405-406). The motions were denied (R. 269, 422), and the argument overruled in its opinion (R. 437-439).

The point was further pursued before the Appellate Division, Third Department in Point II (pp. 17-23) of Appellant's brief before that Court and rejected in its opinion (R. 461).

The Court of Appeals refrained from commenting on this issue in its opinion. However, the remittitur as amended (Appendix "C"), concedes that the issue was presented to, passed upon, and rejected by that Court.

iii) The failure of the Court to order or direct the non-resident grand jury witness to answer questions to which the plea of privilege is asserted, after the offer of New York immunity and the witness' reassertion of his plea, where the existing peril of prosecution is real and substantial, and the grand jury minutes transmitted to a New York agency cooperating with other states and the Federal government, constitutes a denial of procedural due process in violation of the Fourteenth Amendment.

This point was urged before the trial court (R. 191-193, 196, 137) upon cross-examination of the grand jury foreman, by motion for a directed judgment of acquittal, (denied R. 199), and by motion for dismissal of the indictment and for acquittal (R. 203-204). These motions were denied (R. 206); by offer of proof to show existing perils of prosecution, argument (R. 222, 232, 237-238), denied by the Court (R. 249, 252, 259-262); by motion to acquit and the denial thereof (R. 268-269); by motion for judgment of acquittal and summation (R. 275-277, 282-283, 285-286, 288, 294, 304-306, 313-316, 349, 354), denied by the Court's decision (R. 373); by motions for arrest of judgment and for a new trial (R. 380-417) which were denied (R. 422). The Trial Court's opinion dismissed this argument (R. 433).

The point was argued before the Appellate Division, Third Department, in Appellant's Brief (Point I, pp. 13-16) and overruled (R. 460-461).

The point was submitted to the Court of Appeals in Appellant's Brief (Point I, pp. 13-21) but evaded by that Court, 7 N. Y. 2d 571, 575-576, 200 N. Y. S. 2d 43, 45, which held "that the Grand Jury had unquestioned power to confer immunity upon Riela and direct him to answer under pain of prosecution for contempt."

(iv) The offer of New York State immunity to a non-resident is not co-extensive with the existing perils of prosecution where the witness must return to his home state and where New York Grand Jury minutes are transmitted to divers agencies cooperating with his home state, other states, and the Federal government. The trial court's rejection of the appellant's offer of proof to establish the existing perils of prosecution and the absence of a court hearing on his asserted plea of privilege before the Grand Jury after conferral of New York immunity, constituted a denial of due process.

This issue was presented to the trial court by offer of proof (R. 208, 232, 248, 249), denied (R. 249); by motion for acquittal and summation (R. 304-305, 384, 402-406), denied (R. 422). The court's opinion dismissed the contention (R. 437-439).

The issue was presented to the Appellate Division, Third Department, by Appellant's Brief (Point II, pp. 17-23) and rejected by its opinion (R. 461).

The issue was presented to the Court of Appeals in Appellant's Brief (Point II, pp. 21-24) and Point VI (pp. 36-38). The Court overruled appellant in its opinion, 7 N. Y. 2d 571, 576, 200 N. Y. S. 2d 43, 45 stating: "And to the second point, it is equally clear, under current decisions, that a witness may be compelled to answer in a state proceeding, as long as the immunity granted by the state protects against prosecution under *its* laws, even though it may not protect against prosecution by the Federal government or by other states."

(v) The trial court's denial of the appellant's offer of proof to show the lack of authority, jurisdiction and good faith of the Grand Jury, constituted a denial of due process.

This issue was presented to the trial court by appellant by cross-examination of the grand jury foreman, excluded by the court (R. 178-179, 182, 164, 146, 172-176), by offer of proof (R. 255-259), denied (R. 262); by motion to acquit (R. 268-275), denied (R. 269); by reading the court orders into the record (R. 213-216); by motion for arrest of judgment (R. 389, 400, 410, 412), denied (R. 422). The trial court upheld the authority, jurisdiction and good faith of the grand jury by adopting the theory of presumption of regularity (R. 435) over the presumption of innocence (R. 205).

The point was argued to the Appellate Division, Third Department in appellant's brief (Point VI, pp. 31-36). That Court ignored the issue by holding that a grand jury may investigate whether a crime has been committed or not (R. 462).

The point was presented to the Court of Appeals in Appellant's Brief (Point V, pp. 31-36) and held not to warrant discussion, 7 N. Y. 2d 571, 575, 200 N. Y. S. 2d, 43, 45.

Reasons for Granting the Writ

(1) The lack of a Court direction that witness answer.

The lack of a Court direction that a witness answer where a plea of privilege is asserted, constitutes a denial of due process and a violation of uniformly recognized procedure in both state and federal courts. *Quinn v. United State*, 349 U. S. 155, 167.

A conflict pertaining to the validity of procedure in contempt adjudication exists between the New York Court of

Appeals in *People* v. *Riela*, 7 N. Y. 2d 571, 200 N. Y. S. 2d 43, and this Court in *Brown* v. *United States*, 359 U. S. 41, 49; *Levine* v. *United States*, 362 U. S. 610, 612; *Raley* v. *Ohio*, 360 U. S. 423 (state court-direction by court); *Mills* v. *Louisiana*, 360 U. S. 230 (state court-direction by court); *Knapp* v. *Schweitzer*, 357 U. S. 371 (state court-direction by judge in § 750 Judiciary Law proceeding); *Emspak* v. *United States*, 349 U. S. 190, 197, 202 (Congressional Committee-direction required); the First Circuit Court, in *Carlson* v. *United States*, 209 F. 2d 209, 214 (C.A. 1st Cir.) (court direction required—United States District Court Grand Jury); the Supreme Judicial Court of Maine, in *Gendron* v. *Burnham*, 146 Me. 387, 405, 406, 82 A. 2d 773, 784-788 (state court-direction required).

The New York Court of Appeals held that State Immunity conferred was adequate and cited *Mills* and *Knapp*, *supra*, and *Commission Of Investigation* v. *Lombardozzi*, 5 N. Y. 2d 1026, 185 N. Y. S. 2d 550, appeal dismissed *sub nom. Castellano* v. *Commission Of Investigation*, 361 U. S. 7. *Mills* and *Knapp* each had a court direction after the grant of immunity. *Castellano* had the direction by the Commission after the immunity grant. None of these cases involved a New York non-resident.

As to the required court direction, the Appellate Division, Third Department, in its opinion (R. 461) stated:

> "The case of Brown v. United States, (359 U. S. 41) uses language from which appellant gains some comfort, but it involved a Federal statute and is by no means controlling in New York State in a prosecution under section 600 of the Penal Law and where the procedure authorized by section 2447 of the Penal Law was meticulously followed."

The New York Court of Appeals (7 N. Y. 2d 571, 200 N. Y. S. 2d 43, 45) adopted this reasoning by stating: "It is necessary only to observe that a reading of section 2447 makes it manifest that the grand jury had unquestioned power to confer immunity upon Riela and direct him to answer under pain of prosecution for contempt." This begs the question for it omits the entire issue of procedural due process.

Penal Law § 2447 is no more effective in granting State immunity as applied to the instant case than the immunity conferred federally in *Brown* v. *United States*, 349 U.S. 41, by § 205 of the Motor Carrier Act (49 U.S.C. 305 (d)); or the Ohio immunity statute in *Raley* v. *Ohio*, 360 U. S. 423; or, the Louisiana statute conferring immunity in *Mills* v. *Louisiana*, 360 U. S. 230. Each of these cases held that even though immunity be conferred by statute, the *specific direction* to answer is a vital condition precedent to the commission of contempt.

Penal Law § 2447 sets forth the condition precedent for the grand jury conferring immunity but it does not and cannot substitute the right of a witness to be heard by the court to interpose his plea of privilege against self-incrimination and to establish the validity thereof. This statute cannot usurp the power and duty of a trial judge to evaluate the merits of the plea of privilege, especially where a non-resident is involved under the peculiar facts herein. If it does, it denies the substantive due process as well as procedural due process of a witness. It was so applied here.

The New York Court of Appeals ignored *Brown* v. *United States*, 359 U. S. 41, 49, cited and argued by appellant. The

procedure there set forth by Mr. Justice Stewart at 351 U. S. 41, *49* is clear and unambiguous.

> "Even after an adverse ruling upon the claim of privilege, the petitioner was still guilty of no contempt. It was incumbent upon the court unequivocally to order the petitioner to answer. * * * The court did so.
>
> "When upon his return to the grand jury room the petitioner again refused to answer the grand jury's questions, now in direct disobedience of the court's order, he was for the first time guilty of contempt, * * * "

Due process requires the Court to give the witness an opportunity to be heard. *Carlson* v. *United States*, 209 F. 2d 209, 215 (C.A. 1st Cir.).

(2) The denial of procedural and substantive due process by joint application of statutes.

The joint application of § 618-a C.C.P. with § 2447 Penal Law to the facts herein, involving a New York non-resident, violates due process under the Fourteenth Amendment where the non-resident witness is a potential defendant and target of investigation. The granting of local state immunity is not co-extensive with the existing perils of prosecution and dissipates the witness's plea of privilege in his home state, other states, and the Federal government. The joint statutory application to the facts herein circumvented the constitutional safeguards of the witness.

The federal questions involved herein are real and substantial. The certificate of the Court of Appeals amending the remittitur shows that it considered the constitutional

questions and that such consideration was necessary to the court's determination.

Although Penal Law § 2447 has been upheld as constitutional, this is the first case in which it has been applied to a non-resident who must return to his home state. In the instant case, the transmittal of grand jury minutes to a state agency obligated by law to cooperation with other states and the Federal government (§§ 7051-7057, Unconsol. Laws), vitiates and nullifies the state and Federal constitutional privilege against self-incrimination and is repugnant to the Fourteenth Amendment. Although validly applied in other cases, the application of Penal Law § 2447 to the facts herein rendered the statute invalid.

§ 618-a C.C.P. is applicable solely to material witnesses and not as here to a potential defendant and target of investigation. That appellant was a potential defendant is apparent from the District Attorney's statement to him before the Grand Jury (R. 71). Cf. *State of New York v. O'Neill*, 359 U. S. 1, 8, where the constitutionality of this statute was upheld provided a hearing is held. However, Mr. Justice Frankfurter at page 8 declared:

> "No claim is before us that the administration of the statute in the particular circumstances of this case violates due process."

In the instant case, repeated claim was made that no hearing on materiality was held (although the order of the forwarding state so declares), despite the reservation of his claim and rights to a hearing on the issue of his materiality as a witness; that no crime was committed; that the grand jury had no authority and jurisdiction to investigate a party; and that the grand jury was created as a "tool",

or implement of the Office of the Commissioner of Investigation.

Assuming, but not conceding, the proper application of § 618-a C.C.P. herein, the further use of § 2447 Penal Law to the non-resident herein cries injustice where no direction to answer was made to the witness and *no opportunity given to the witness to be heard as to why his plea of privilege was asserted*, or to prove the existing perils of prosecution. The instant grand jury minutes were transmitted pursuant to orders signed by the same trial judge, to the Acting Commissioner of Investigation on January 15, 1958, and subsequently on August 1, 1958 to the Commission of Investigation, and thereafter on August 4, 1959 to the United States Attorney for the Southern District of New York, for use at trial of Indictment #C-159-35 in which petitioner was a defendant. These facts were reason enough to establish peril of prosecution. Further, the trial judge had judicial notice (and actual notice) of the statute (Unconsol. Laws § 7052 subd. (5), (6), (7) and (9)) of the obligation of the Commission to cooperate with other state and federal agencies.

It is the joint application of these statutes to the facts herein which constitutes a denial of substantive and procedural due process.

In the light of common investigatory practices of state and county grand juries with extra-territorial powers of subpoena upheld by this Court (*New York* v. *O'Neill*, 359 U. S. 1), a non-resident witness's constitutional rights of privilege against self-incrimination in his home state, other states and the Federal government, should be clarified and ordained.

It was obvious to the trial court that the New York immunity to a non-resident in exchange for testimonial compulsion, was not co-extensive with the existing perils of prosecution in his home state, other states and the Federal government where the witness *had* to return home and Grand Jury minutes forwarded to divers agencies cooperating with his home state. Cf. *Heffman* v. *United States*, 341 U. S. 479; cf. *Ullman* v. *United States*, 350 U. S. 422; cf *Knapp* v. *Schweitzer*, 357 U. S. 371.

No case other than the within, involving a non-resident witness of New York, to whom New York immunity is granted, has ever been decided, where existing facts make the offered immunity hollow and not co-extensive with the real perils of prosecution.[1]

(3) *Feldman* v. *United States* should be reconsidered.

The facts herein warrant the reconsideration of the doctrine of *Feldman* v. *United States*, 322 U. S. 487, 489, 493, because of the transmittal[2] of the grand jury testimony to the New York State Commission of Investigation which

[1] The appellant herein was indicted by May 13, 1959 by the United States District Court, S. D. N. Y. for the crime of conspiracy to obstruct justice, based on the incident investigated by the Tioga Grand Jury. He was convicted on January 13, 1960. Appeal is now pending before the Court of Appeals, Second Circuit.

[2] The Tioga County Court issued court orders transmitting copies of the grand jury minutes as follows:

(a) On January 15, 1958, to the Acting Commissioner of Investigation of the State of New York;

(b) On August 1, 1958, to the Commission of Investigation, the successor agency.

(c) On August 4, 1959, to the United States Attorney, Southern District of New York, for use at trial of indictment No. C-159-35, in which respondent was a defendant, was convicted, and is now appealing.

agency is obligated by statute to cooperate with the witness' home state, other states and the Federal government (§ 7052 subd. (5), (6), (Unconsol. Laws).

The current vogue of state investigative committees and investigating grand juries who cooperate with each other and with other states and Federal agencies is nationwide. The state investigative committees, as such, have no extra-state powers of subpoena. Grand juries do. It will become standard practice to have the result as it exists in the within case, where state committees, by statute, are obligated as here (§ 7052 subd. (5), (6), (7) and (9) Unconsol. Laws), to cooperate with other states and the Federal Government. Where this occurs, immunity to non-residents or residents is hollow and definitely not co-extensive with the existing perils of prosecution (*Hoffman* v. *United States*, 341 U. S. 479).

For testimony so extracted to be used in federal and state prosecutions—under threat of contempt for failure to give such testimony—does violence to the rights of the privilege against self-incrimination.

The proper procedure in obtaining such testimony would be for the court to impose secrecy restrictions or to otherwise protect the witness who is on the horns of a dilemma. See *Matter of Haverlands* (*Carcietta*), 204 Misc. 373, 377, 124 N. Y. S. 2d 402, 405-406, *In re Amato*, 204 Misc. 454, 459, 124 N. Y. S. 2d 726, 730. Failure by the trial court to so act makes it an accomplice in a known and existing method to deprive a witness of his privilege against self-incrimination.

(4) The doctrine of *Jack* v. *Kansas* and *Brown* v. *Walker* is inapplicable.

Each of the lower courts have relied upon the doctrine that the immunity granted by a state is sufficient and need not be applicable to the Federal government, and vice versa. *Jack* v. *Kansas*, 199 U. S. 372, *Brown* v. *Walker*, 161 U. S. 591.

This principle was based on the absence of the real danger of multiple prosecutions.

The New York rule is based on *Dunham* v. *Ottinger*, 243 N. Y. 438. But *Dunham* in reaching its conclusion relied upon the secrecy provisions contained in the statute which that case upheld and the misdemeanor punishment for publicizing information obtained pursuant to the statute there involved (§ 352, subd. (5), Gen. Bus. Law) (Vol. 19, McKinney's Consol. Laws). *Dunham* relied on *Brown* v. *Walker*.

In the instant case, the peril of prosecution was real, and not remote. *Hoffman* v. *United States*, 341 U. S. 479. The secrecy provisions of the *Dunham* statute are missing. To the contrary, publicity and cooperation were compulsory. The grand jury minutes were transmitted to state agencies obligated by law to cooperate with other states and the Federal government (§ 7052, subd. (5), (6), (7), (9) Unconsol. Laws).

The New York Court of Appeals relied on *Knapp* v. *Schweitzer*, 357 U. S. 371 which in turn relies on *Jack* v. *Kansas*, 199 U. S. 372.

None of the foregoing cases dealt with a non-resident witness' plea of privilege against self-incrimination where

the perils of prosecution were a reality and where grand jury minutes are freely supplied to federal and state agencies.

The facts herein require the application of *Hoffman* v. *United States*, 341 U. S. 479 instead of *Jack* v. *Kansas*, 199 U. S. 372 because the perils of prosecution were a reality, not a contingency, and the proffered immunity not co-extensive therewith.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX "A"

Opinion of the Court of Appeals
(7 N. Y. 2d 571, 200 N. Y. S. 2d 43)

PEOPLE v. RIELA
Cite as 200 N. Y. S. 2d 43

7 N. Y. 2d 571

PEOPLE of the State of New York, Respondent, v.
Anthony Peter RIELA, Appellant.

Court of Appeals of New York.
April 21, 1960.

* * * * *

FULD, Judge.

Anthony Peter Riela was one of the 60-odd guests who had gathered at the country estate of Joseph Barbara in Apalachin, New York, on a November day in 1957. This gathering, having attracted considerable attention from law enforcement officials, became the target of investigation by the Grand Jury of Tioga County. Riela, called as a witness, made two appearances before that body. From the beginning, he refused to answer any questions concerning the "Apalachin meeting", as it has come to be known, on the ground that to do so might tend to incriminate him and, in the course of his two appearances before the Grand Jury, he persisted in the claim of privilege and declined to answer 17 questions about that same subject. Thereupon, at the request of the District Attorney of Tioga County, the Grand Jury, acting pursuant to the authority vested in it by section 2447 of the Penal Law, Consol. Laws, c. 40,

"conferred immunity" upon Riela and ordered him, following the procedure prescribed by the statute, to answer the questions previously put to him. The same 17 questions were again asked and Riela, reiterating his reliance upon the privilege, again refused to answer.

As a consequence of his refusal, the Grand Jury indicted him, charging him, in 17 different counts, with 17 separate crimes of contempt in violation of section 600 of the Penal Law. The defendant waived his right to a jury and went to trial before the County Judge. The latter, finding him guilty on all 17 counts, sentenced him to 60 days in jail upon each, to run concurrently, and imposed a fine of $250 on each count, for a total fine of $4,250.

[1, 2] Before proceeding to an elaboration of the question which prompted the grant of leave to appeal to this court, we consider briefly the only two other points urged by the defendant which warrant discussion: (1) that the immunity provided by section 2447 of the Penal Law had not been properly conferred and (2) that, in any event, such immunity was not broad enough to assure him the protection guaranteed by the Constitution. As to the first, it is necessary only to observe that a reading of section 2447 makes it manifest that the Grand Jury had unquestioned power to confer immunity upon Riela and direct him to answer under pain of prosecution for contempt. And, as to the second point, it is equally clear, under current decisions, that a witness may be compelled to answer in a state proceeding as long as the immunity granted by the state protects against prosecution under *its* laws, even though it may not protect against prosecution by the federal government or by other states. See, e.g., Mills v. Louisiana, 360 U. S. 230, 79 S. Ct. 980, 3 L. Ed. 2d 1193; Knapp v. Schweitzer, 357

U. S. 371, 78 S. Ct. 1302, 2 L. Ed. 2d 1393; Commission of Investigation of State of N. Y. v. Lombardozzi, 5 N. Y. 2d 1026, 185 N. Y. S. 2d 550, appeal dismissed sub nom. Castellano v. Commission of Investigation, 361 U. S. 7, 80 S. Ct. 51, 4 L. Ed. 2d 49.

[3] We come, now, to the real question in the case, namely, whether the defendant is guilty of 17 crimes of contempt or of one. Concerning this, it is our opinion that, while there can be no doubt that Riela's conduct before the Grand Jury constituted criminal contempt under section 600 of the Penal Law, his conviction of 17 separate crimes of contempt, each susceptible to punishment of a year in prison, was totally unjustified.

It is quite true, as the Appellate Division observed [9 A. D. 2d 481, 195 N. Y. S. 2d 563], that "the questions [asked of the defendant] were by no means the same question rephrased", but, in a case such as the present, where the refusal to answer was grounded, albeit mistakenly on the privilege against self-incrimination, the circumstance that no two questions could have been answered by a single response is beside the point. What is of significance is that it was apparent from the very start of his interrogation that Riela, relying upon the privilege, would decline to answer any question bearing on the "Apalachin meeting", and that the questions, different though they were from one another, all related to that one subject. This being so, he is guilty of the single contempt of refusing to give testimony concerning the Apalachin gathering, rather than 17 contempts for refusal to answer individual questions about it. See, e.g., Yates v. United States, 355 U. S. 66, 73, 78 S. Ct. 128, 2 L. Ed. 2d 95; United States v. Costello, 2 Cir., 198 F. 2d 200, 204, certiorari denied 344 U. S. 874, 73 S. Ct.

166, 97 L. Ed. 677; United States v. Orman, 3 Cir., 207 F. 2d 148, 160; Maxwell v. Rives, 11 Nev. 213, 221; Fawick Airflex Co. v. United Elec., Radio & Mach. Workers, Ohio App., 92 N. E. 2d 431, 436, appeal dismissed 154 Ohio St. 206, 93 N. E. 2d 480.

[4] Any other result impresses us as offensive, for, if each separate reassertion of privilege and refusal to answer were to be treated as a distinct contempt, there would be no limit to the number of contempts for which Riela could have been held. The District Attorney could just as well have asked 60 questions about Apalachin—for instance, whether Riela knew each of the 60 individuals reputed to have been present—as 17, and, if each could become the predicate of a distinct contempt, the limit of punishment would then depend only on the extent of the District Attorney's ingenuity and whim. As the Supreme Court said in the somewhat similar case of Yates v. United States (355 U. S. 66, 73, 78 S. Ct. 128, 133, supra), "the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers."

[5, 6] Riela, under existing law, may well have been under the necessity, once he asserted the privilege, of repeating the claim as to each and every question asked him, lest an answer to any one be deemed to effect a complete waiver of the privilege. See e.g., People v. Cassidy, 213 N. Y. 388, 394, 107 N. E. 713, 715; Rogers v. United States, 340 U. S. 367, 372-374, 71 S. Ct. 438, 95 L. Ed. 344; Brown v. Walker, 161 U. S. 591, 597, 16 S. Ct. 644, 40 L. Ed. 819; 8 Wigmore, Evidence [3d ed., 1940], pp. 438-439. This being so—to paraphrase what was said in the Costello case (198 F. 2d 200, 204, supra)—the contempt was total when the defendant

made it clear that he would not answer questions about Apalachin on the ground of self-incrimination and his repeated refusals may not properly be considered as anything more than expressions of his intention to adhere to his initial assertion of the privilege; and, surely, they were not separately punishable. The contempt here to be punished is Riela's misguided refusal to give any testimony about Apalachin, and not his reiteration of that refusal in response to the many questions which the District Attorney elected to put to him.

People v. Saperstein (2 N. Y. 2d 210, 159 N. Y. S. 2d 160, 162, certiorari denied 335 U. S. 946, 77 S. Ct. 825, 1 L. Ed. 2d 856), upon which the People strongly rely, does not support their contrary position; the situation with which we there dealt was essentially different from the one now before us. Saperstein was adjudged guilty of five crimes of contempt because of his evasiveness or, more specifically, his refusal "to state definitely" who were the participants in five separate telephone conversations which had been wire tapped. Each of the contempts was based not upon a refusal grounded on any claim of privilege, but, among other things, on his patently evasive testimony that he did not know, and could not tell, whether he himself had participated in those telephone conversations. These refusals came at different points during the course of testimony which was otherwise freely given, and each refusal was unrelated to every other one. Under such circumstances, there could be no assurance, after the witness had refused to answer the question with respect to the first phone call, that he would likewise refuse to answer the later questions about the other conversations. It was not possible in Saperstein, as it was here, to predict or

foresee the pattern of refusal which necessarily attends the assertion of a claim of privilege.

In short, what distinguishes this case from People v. Saperstein is that here we have a claim of privilege which "carved out an area of refusal". Yates v. United States, 355 U. S. 66, 73, 78 S. Ct. 128, 133, supra. In the present case, the District Attorney necessarily knew, ahead of time, that the claim of privilege once asserted would be repeated, while in Saperstein the prosecutor had to continue questioning to find the limits of the defendant's refusal to answer. In Saperstein, in other words, the District Attorney was engaged in bona fide interrogation, in the sense that he could reasonably have supposed that the witness would answer each of the questions asked, while here the District Attorney repeated 17 questions knowing full well from Riela's response to his first query that he would not answer any of them.

The defendant committed but a single contempt with relation to one subject; his conviction of 17 separate crimes was, therefore, impermissible and the sentences imposed may not stand.

The judgment should be reversed and the case remitted to the County Court of Tioga County for resentence.

DESMOND C. J., and DYE, FROESSEL, VAN VOORHEES, BURKE and FOSTER, JJ., concur.

Judgment reversed, etc.

APPENDIX "B"

Order of the Court of Appeals Denying Motion for Reargument

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighth day of July A. D. 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 414

The People &c.,

Respondent,

vs.

Anthony P. Riela,

Appellant.

A motion for a reargument of the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

(SEAL)

GEARON KIMBALL.
Deputy Clerk

APPENDIX "C"

Order of the Court of Appeals Amending Remittitur

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighth day of July A. D. 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 414

The People &c.,

Respondent.

vs.

Anthony P. Riela,

Appellant.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Appendix "C"—Order of the Court of Appeals Amending Remittitur

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States as follows: The defendant contended that the application in his case of §2447 of the Penal Law and §618-a of the Code of Criminal Procedure violated his rights under the Fourteenth Amendment of the Federal Constitution. The Court of Appeals held that the defendant's rights under the Fourteenth Amendment were not violated. (See *People* v. *Riela*, 7 N. Y. 2d 571.)

And the County Court of Tioga County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(Seal)

Gearon Kimball
Deputy Clerk

APPENDIX "D"

Judgment of Conviction

At an adjourned term of the County Court held in and for the County of Tioga at the Court House in the Village of Owego, N. Y., on the 12th day of July, 1960.

Present:

HON. FRANCIS J. CLOHESSY,
County Judge of Tioga County.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

ANTHONY PETER RIELA

The defendant, Anthony Peter Riela, having been indicted by a Grand Jury sitting in connection with the County Court held in and for the County of Tioga on the 25th day of February, 1958, which indictment sets forth seventeen counts, each of which charges the Crime of Criminal Contempt in Violation of Section 600, Subdivision 6, of the Penal Law of the State of New York, committed on the 25th day of February, 1958,

And the defendant, Anthony Peter Riela, having appeared in County Court with Louis Mansdorf, Esq., his Counsel, and having been tried before the Hon. Francis J. Clohessy, County Judge of Tioga County at a trial without

a jury beginning on September 30, 1958 and terminating on October 3, 1958;

And the Hon. Francis J. Clohessy, County Judge of Tioga County having filed his Decision on the 15th day of October, 1958, finding the defendant, Anthony Peter Riela, guilty under and as charged in each of the seventeen counts of the indictment;

And the defendant, Anthony Peter Riela, having thereafter appeared in County Court with Louis Mansdorf, Esq., his Counsel, on the 24th day of October, 1958, and having been sentenced under the first count of the indictment to sixty (60) days imprisonment in the Tioga County Jail and to pay a fine of $250.00, and stand committed to the Tioga County Jail until the fine be satisfied at the rate of one day for every dollar of the fine unpaid.

And it having been further Ordered that the defendant, Anthony Peter Riela, under each of the sixteen remaining counts be sentenced to imprisonment in the Tioga County Jail for sixty (60) days and to pay a fine of $250.00, and stand committed to the Tioga County Jail until the fine be satisfied at the rate of one day for every dollar of the fine unpaid, it being the intention and Judgment that a sentence of sixty (60) days imprisonment and a fine of $250.00 should apply to and cover each count; and it further being Ordered by the Court that the respective jail sentences of sixty (60) days imprisonment under each of the seventeen counts should run concurrently.

And the defendant, Anthony Peter Riela, having appeared in Court on the 20th day of June, 1960, with Louis Mansdorf, Esq., his Counsel for re-sentencing pursuant to an Order of the Court of Appeals of the State of New York filed May 11, 1960 whereby the Judgment pronounced October 28, 1958 was reversed and the case remitted to County

Court for re-sentencing; and the defendant having made application to the Court for an adjournment of sentence pending an Appeal to the United States Supreme Court; and the sentence having been adjourned until July 12, 1960;

And the defendant, Anthony Peter Riela, having appeared in County Court on July 12, 1960 with Louis Mansdorf, Esq., his counsel, and the Court having set aside and vacated the previous sentence imposed on October 24, 1958, and the defendant, Anthony Peter Riela having been asked by the Clerk if he had any legal cause to show why judgment should not now be pronounced against him, and the defendant having answered in the negative;

And the defendant having waived the 48 hour waiting period;

It is hereby Ordered by the Court that the defendant, Anthony Peter Riela, be imprisoned in the Tioga County Jail for a term of sixty (60) days and pay a fine of $250.00.

La Verne M. Brister
County Clerk

APPENDIX "E"

Statutes Involved

Penal Law § 600. CRIMINAL CONTEMPT. A person who commits a contempt of court, of any one of the following kinds is guilty of a misdemeanor:

* * * * *

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; * * * (McKinney's Consolidated Laws, Vol. 39, Part 1) L. 1935, c. 299, § 1, eff. April 5, 1935.

CODE OF CRIMINAL PROCEDURE. SECTION 618-a (McKinney's Consolidated Laws, Vol. 66, Part 2)

SECURING ATTENDANCE OF WITNESSES FROM WITHIN AND WITHOUT THE STATE IN CRIMINAL PROCEEDINGS.

1. As used in this section the following words shall have the following meanings unless the context requires otherwise.

"Witness" shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

"State" shall include any territory of the United States and the District of Columbia.

"Subpoena" shall include a summons in any state where a summons is used in lieu of a subpoena.

* * * * *

3. Witness from another state subpoenaed to testify in this state. If a person in any state, which by its laws has

made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and delivery, for which determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him until he may be released by bail, recognizance, or order of the judge issuing the certificate.

• • • If such witness fails without good cause to attend and testify as directed in the subpoena, he shall be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this state.

• • • • •

5. Uniformity of interpretation. This section shall be so interpreted and construed as to effectuate its general

purpose to make uniform the law of the states which enact it. • • • L. 1936, c. 387, eff. May 1, 1936.

Penal Law § 2447. WITNESSES' IMMUNITY. 1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

* * * * *

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; * * *.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

L. 1935, c. 299, § 1, eff. April 5, 1935.

(McKinney's Consolidated Laws, Vol. 39, Part 2.)

UNCONSOLIDATED LAWS, McKINNEY'S VOLUME 65, PART 2. SECTIONS 7051-7057 (STATE COMMISSION OF INVESTIGATION).

Section 7052. FUNCTIONS, POWERS AND DUTIES OF THE COMMISSION.

Subd. 5. The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state.

Subd. 6. The commission shall examine into matters relating to law enforcement extending across the boundaries of the state into other states; and may consult and exchange information with officers and agencies of other states with respect to law enforcement problems of mutual concern to this and other states.

Subd. 7. Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for

the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer.

Subd. 9. The commission shall make an annual report to the governor and legislature which shall include its recommendations. The commission shall make such further interim reports to the governor, or to the governor and legislature, as it shall deem advisable, or as shall be required by the governor.

L. 1958, c. 989 § 2, eff. May 1, 1958.

NEW JERSEY REVISED STATUTES

ARTICLE 2, PRIVILEGES OF WITNESS:

2A:81-4 General Rule:

Except as otherwise provided by statute, a witness shall not be excused from answering any questions relevant and material to the issue (L. 1900, c. 150, §§ 5, 8, pp. 363, 364).

2A:81-5 Personal Privilege Generally.

No witness shall be compelled to answer any question if the answer will expose him to a criminal prosecution or penalty or to a forfeiture of his estate (L. 1900, c. 150, § 8, p. 364).

GENERAL BUSINESS LAW:

(McKinney's Vol. 19, Consol. Laws)

§ 352. Investigation by Attorney General.

5. * * *. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who

shall disclose to any person other than the attorney-general the name of any witness examined or any other information obtained upon such inquiry except as directed by the attorney-general shall be guilty of a misdemeanor. Added L. 1921, c. 649; amended L. 1923, c. 600, § 1; L. 1925, c. 239, § 1; L. 1926, c. 617, § 1; L. 1927, c. 365; L. 1932, c. 214; L. 1935, c. 271; L. 1949, c. 525; L. 1955, c. 553, § 1, eff. April 21, 1955.